Supreme Court, U.S.
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No. 94 505 SEP 19 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TRANSPORTACION MARITIMA MEXICANA, S.A.
and MARITIMA ASTARTE, S.A.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

DAVID B. TAMMEN; INTERNATIONAL
TRANSPORTATION SERVICES, INC. and
NATIONAL UNION FIRE INSURANCE COMPANY,

Real Parties-In-Interest.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

1. Are the five restrictive factors in granting discretionary review by writ of mandamus under *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977) compatible with the two standards set forth in *Mallard v. U.S. District Court of Iowa*, 490 U.S. 296, 104 L.Ed.2d 318, 109 S.Ct. 1814 (1989)?

2. Is the appointment of a special master to preside over pretrial proceedings determined by the jury or nonjury standard?

3. May an Article III district judge delegate his authority to decide disputed questions of fact and law to a private attorney appointed as special master?

PARTIES TO THE PROCEEDING

AND Rule 29.1 STATMENT

Petitioners TRANSPORTACION MARITIMA MEXICANA S.A. DE C.V. and MARITIMA ASTARTE, S.A. hereby state that neither they nor any of their subsidiaries or affiliates have issued shares to the public in the United States. Petitioners TRANSPORTACION MARITIMA MEXICANA S.A. DE C.V. and MARITIMA ASTARTE, S.A. are themselves affiliated with one another. The subsidiaries and affiliates of the Petitioners are:

Servicios Maritimos Mexicanos, S.A. de C.V.
Transportes Maritimos Mexico, S.A. de C.V.
Transportes Maritimos del Pacifico, S.A. de C.V.
Transportes Maritimos Anahuac, S.A. de C.V.
Transportacion Maritima del Pacifico, S.A.
Maritima Mexicana, S.A.
Naviera del Pacifico, S.A.
Agencia Maritima Mexicana, S.A. de C.V.
Linea Mexicana del Pacifico, S.A.
Contrataciones Maritimas, S.A. de C.V.
Aerotransportes de Mexico, S.A. de C.V.
Inmobiliaria TMM, S.A.
Servicios Mexicanos Turisticos, S.A. de C.V.
TMM Multimodal, S.A. de C.V.
Transportacion Terreste TMM, S.A. de C.V.
Servicios Corporativos TMM, S.A. de C.V.
Operadora Maritima TMM, S.A. de C.V.
Servicios de Inspeccion y Mantenimiento
de Contenedores, S.A. de C.V.
Servicios Administrativos Serimac, S.A. de C.V.
Operadora Portuaria TMM, S.A. de C.V.
Transportes Petroleros Mexicanos, S.A. de C.V.
Hipocampo, S.A.
T.M.M. Overseas, Ltd.

Caribou Shipping, Ltd.
Halley Shipping, Ltd.
Cordoba Navigation, Ltd.
Tabasco Shipping, Ltd.
Tula Navigation, Ltd.
Mexmarine, Ltd. y Subsidiarias
Mexrail, Inc. y Subsidiaria
Trans-American Steamship Agency, Inc.
Financial and Investment Services, Ltd.
Compania Mexicana de Terminales, S.A. de C.V.
Trasportacion Aerea Mesicana, S.A. de C.V.
Empresa de Servicios CMT, S.A. de C.V.
Comercializadora Internacional de Carga, S.A. de C.V.
Global Reefers Carriers, Ltd.

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No. _____

In The
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October Term, 1994

TRANSPORTACION MARITIMA MEXICANA, S.A.
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PETITION FOR WRIT OF CERTIORARI

Petitioners TRANSPORTACION MARITIMA MEXICANA S.A. DE C.V. ("TMM") and MARITIMA ASTARTE, S.A. (hereinafter collectively referred to as "Petitioners") respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, issued in this proceeding on June 21, 1994.

OPINIONS AND ORDER BELOW

The opinion and order of the Ninth Circuit Court of Appeals is attached hereto as Appendix A. The order of the district court is attached hereto as Appendix B.

JURISDICTION

The action below is a diversity action under 28 U.S.C. § 1332 for alleged injury to a longshoremen occurring on the navigable waters of the United States. The relevant district court order was entered on April 19, 1994. On June 3, 1994, Petitioners filed a timely petition for writ of mandamus to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure. The decision of the Court of Appeals denying Petitioners' petition for writ of mandamus was filed on June 21, 1994. This petition is timely under the ninety-day rule of Supreme Court Rule 13.1. The jurisdiction of the Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The writ is sought under Supreme Court Rule 10.1(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 1, of the United States Constitution, The All Writs Act, 28 U.S.C. § 1651, and Rule 53 of the Federal Rules of Civil Procedure are all set out in Appendix C, and are also set out in the relevant parts of the Reasons below.

SYNOPSIS

After the pretrial conference in the district court action below, the district court judge unilaterally appointed a private attorney as special master with plenary power to resolve a number of outcome-determinative contested issues as to evidence and law. In so doing, the district court did not explain whether it used the jury or the nonjury standard of Rule 53 of the Federal Rules of Civil Procedure, and there is a confusion between the circuits as to which standard to apply prior to a jury trial. Certiorari would clarify an important issue.

In so delegating its judicial power to a nonjudicial entity, the district court clearly exceeded its authority. Petitioners' application for review by writ of mandate was denied in a brief ruling only citing to *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). *Bauman*, a 1977 case, is regularly used by the Ninth Circuit in determining whether mandamus relief is proper, and consists of a highly restrictive five-prong balancing analysis. *Bauman* appears to be in conflict with this Court's "clear entitlement" test that was enunciated in *Mallard v. U. S. District Court of Iowa*, 490 U.S. 296, 104 L.Ed.2d 318, 109 S.Ct. 1814 (1989). Inasmuch as mandamus is an important means of overseeing district court conduct, certiorari would clarify an important issue.

STATEMENT OF THE CASE

The action in the district court below arises out of personal injuries allegedly sustained by Plaintiff DAVID B. TAMMEN ("Plaintiff") on October 14, 1991, when he fell while working as a longshoreman aboard the vessel M/V MITLA (which was owned by Petitioner ASTARTE and time chartered by Petitioner TMM) while the vessel was discharging cargo at the Port of Long Beach. The district court has jurisdiction over said action under 28 U.S.C. § 1332.

At the time of his alleged accident, Plaintiff was employed by ITS, an independent stevedore company hired by petitioner TMM to unload cargo from the M/V MITLA. Plaintiff brought an action against Petitioners pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "LHWCA"), alleging that Petitioners were negligent in causing Plaintiff's fall. Plaintiffs-In-Intervention INTERNATIONAL TRANSPORTATION SERVICES, INC. ("ITS") and its worker's compensation insurer, NATIONAL UNION FIRE INSURANCE COMPANY (hereinafter collectively referred to as "ITS"), filed a Complaint-In-Intervention against Petitioners to assert their rights to reimbursement for over $215,000 in worker's compensation and medical payments made to Plaintiff under the LHWCA. Accordingly, the action below is a garden-variety, third-party longshoreman's personal injury action for trial before a jury.

On March 22, 1994, Petitioners timely filed seven Evidentiary Motions (Testimony Required) in accordance with the district court's Order Re Preparation For Jury Trial Civil or Criminal (Where Applicable). Petitioners requested that Plaintiff be prohibited from:

(1) Introducing evidence or argument either that strict liability be imposed for an alleged design defect in the vessel M/V MITLA, or that vicarious liability be imposed against Petitioners for the alleged negligence of the vessel's builder/designers pursuant to the Second Restatement of Torts § 422.

(2) Presenting evidence of paragraph 2.3 of the contract between Petitioner TMM and ITS as evidence of an alleged higher than normal tort duty of care owed by TMM under this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 68 L.Ed.2d 1, 101 S.Ct. 1614 (1981).

(3) Presenting OSHA and Coast Guard Regulations, the Pacific Coast Marine Safety Code ("PCMSC") and the New York Joint Marine Safety Code ("NYJMSC") as evidence of the standard of care owed by Petitioners on the grounds that such regulations and the two Codes are inapplicable to the vessel.

Whether Plaintiff is allowed to present the evidence which is the subject of the foregoing motions may well determine the outcome of the action below. Petitioners' four other evidentiary motions requested that the court exclude: evidence of their P&I Club cover and/or insurance; testimony and evidence relating to other accidents aboard the vessel and other ships owned by Petitioners; testimony and evidence relating to a labor

arbitration between ITS and the International Longshoremen and Warehouseworkers' Union; and duplicative testimony by Plaintiffs' experts.

On March 22, 1994, Plaintiff filed five motions *in limine*[1] requesting that Petitioners be precluded from presenting:

(1) Evidence of ITS' or Plaintiff's coworkers' negligence, or evidence of workers' compensation payments.

(2) Evidence of fall protection devices.

(3) The testimony of defense stevedore expert, Robert Riley, regarding stevedore custom and practice and fall protection devices.

(4) The testimony of Hugh Monroe, Petitioners' designated expert naval architect for failing to cooperate in discovery.

(5) Petitioners' Exhibits 201 and 202, which are the classification society certificate and report for the M/V MITLA.

On March 23, 1994, Petitioners also filed two motions *in limine*. One was a motion *in limine* to exclude photographs and other evidence of the design and construction of other ships owned by Petitioners, the other was a motion *in limine* to exclude reports by Plaintiff's experts as hearsay.

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[1] Defendants also received a motion *in limine* to exclude evidence of stevedore negligence, etc. by facsimile from Plaintiffs-In-Intervention on March 25, 1994.

The testimony and evidence which is the subject of the foregoing motions may well determine the outcome of the action below.

On April 4, 1994, the district court held a pretrial conference, at which it approved the pretrial conference order prepared by counsel, and took the case off calendar.

The district court set a hearing on Plaintiff's *ex parte* application to reinstate trial on April 19, 1994.

At the April 19 hearing, the district court stated:

> THE COURT: We're here on a status conference. What is going on? That's what I'm trying to find out. *I see plenty of fights between you two. And filing an enormous amount of paperwork. That's why I'm thinking about appointing a special master and designating him to handle all pretrial. Then we'll set the trial down for handling by the magistrate that you pick.* Let's get it straight. That's what I'm going to do.
>
> * * *
>
> THE COURT: . . . I don't see any good reason that you have not to appoint him [the special master]. Tell me what your good reason is, if any.
>
> MR. COGSWELL: It's a violation of Article 3 of the Constitution.
>
> THE COURT: Poppycock.
>
> MR. COGSWELL: A special master is not appropriate to be appointed in any matter involving disputed issues.

THE COURT: That's why I appoint them, particularly in pretrial.

MR. COGSWELL: Is it the court's intention to have him deal with motions in limine, for example?

THE COURT: I said anything in pretrial.

MR. COGSWELL: That's a disputed matter. Those are matters in controversy.

THE COURT: So what?

MR. COGSWELL: It's not appropriate for a special master.

* * *

THE COURT: I thank you both for being quiet while I make these orders. I want Mr. Hoegh to be efficient and I'm sure he will be and a dispassionate special master to handle pretrial proceedings. I think for the benefit of both sets of clients if not attorneys because clients are entitled to, as I see it, to get an end to this paperwork, this paper war going on between counsel. *I'm surely not going to sit on it. I'd rather have an independent man like Mr. Hoegh sit on it.* Because I think there's been a lot of skullduggery here. I don't like it.

I think when you get before the Court of Appeals you're going to find out they're going to say the same

> thing. If you're going to get to them once again. I suppose you're going to go up there once again because I'm not going to listen to you any further. Mr. Hoegh will take over all pretrial matters.

The court then ordered that each side deposit $10,000 with the clerk of the court as security for payment of the special master.

The district court refused to stay its order appointing the special master unless Petitioners "put up a million dollar bond and I will insist it be fully justified and by backing of hard cash."

On April 25, 1994, Petitioners' counsel received a minute order regarding the hearing held on April 19. The court ordered *inter alia*:

> Court appoints and designates Mr. Richard B. Hoegh, Esq. as Special Master to handle all pre-trial proceedings in this case.

On April 27, 1994, Petitioners filed and served their objection to the appointment of the special master on the grounds that:

1. No exceptional circumstances exist which warrant reference of all pretrial matters to a special master.
2. The matter is not of sufficient complexity to warrant reference of all pretrial matters to a special master.
3. The Court's order constitutes a violation of Article III of the United States Constitution (guaranteeing trial of disputed actions by a Title III judge, and not by a private citizen).

The district court did not respond to Petitioners' Objection. On June 3, 1994, therefore, Petitioners filed a petition for writ of mandamus with the Ninth Circuit, requesting that it overturn the district court's order appointing a special master, and stay the district court action pending the Ninth Circuit's decision on the petition.

On June 21, 1994, the Ninth Circuit Court of Appeals denied Petitioners' petition for writ of mandamus and stay, referring only to *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Standards for Denying Mandamus Relief Are In Irreconcilable Conflict With Decisions By This Court And Other Courts Of Appeals.

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of the law.

Whether mandamus relief is granted lies with the sound discretion of the circuit court. *La Buy v. Howes Leather*, 352 U.S. 249, 255, 1 L.Ed.2d 290, 296, 77 S.Ct. 309 (1957) *quoting Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 25, 87 L.Ed. 1185, 1190, 63 S.Ct. 938 (1943). The standard for exercising discretion in the issuance of

a writ of mandamus in the Ninth Circuit (*Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977)) conflicts with the standard afforded by this Court in *Mallard*. This Court is asked to exercise its oversight responsibilities to establish a consistent standard, and to provide guidance whether the restrictive Ninth Circuit standard is superseded by, or coexistent with, *Mallard*.

Mallard v. U.S. District Court of Iowa, 490 U.S. 296, 309, 104 L.Ed.2d 318, 331, 109 S.Ct. 1814 (1989), holds that petitioners for a writ of mandamus must show that they lack adequate alternative means to obtain the relief they seek, and that their right to issuance of the writ is clear and indisputable. The Court has explained this "clear entitlement" requirement by stating that a petitioner must demonstrate a "clear abuse of discretion," or conduct amounting to "usurpation of [the judicial] power" to be entitled to a writ. *Id.*, *quoting Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 98 L.Ed. 106, 74 S.Ct. 145 (1953); *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217, 89 L.Ed. 1566, 65 S.Ct. 1130 (1945).

The Ninth Circuit has adopted a much more complex analysis for determining whether mandamus relief is proper in a given case.[2] In addition, the *Bauman*

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[2] The Ninth Circuit enunciated five guidelines for determining whether mandamus relief is proper in *Bauman v. United States District Court*, 557 F. 2d 650 (9th Cir. 1977), which consist of the following:

(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
(3) The district court's order is clearly erroneous as a matter of law.

(continued)

guidelines are not a "bright line" test; rather, the court is allowed to consider the degree of the court's clear error, and the severity of the damage or prejudice to the petitioner. The guidelines are also cumulative, allowing the court to balance conflicting factors against one another to determine whether mandamus relief is proper.[3] Therefore, the Ninth Circuit will have used the *Bauman* guidelines in the present action to impose a stricter standard for mandamus relief than those enunciated by this Court in *Mallard*.

Petitioners satisfied the *Mallard* test for mandamus relief. First, they clearly lack adequate alternative means to obtain the relief they seek, as "[o]rders of

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(fn. continued)

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the Federal Rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55 (citations omitted).

[3] The Ninth Circuit in *Bauman* stated:

> Although these guidelines are helpful, they of course do not always result in bright line distinctions. First, the guidelines often raise questions of degree: How clear is it that the lower court's order is wrong as a matter of law? How severe will damage to the petitioner be if extraordinary relief is withheld? Second, rarely if ever will a case arise in where all of the guidelines point in the same direction or even where each guideline is relevant or applicable. These considerations are cumulative and a proper disposition will often require a balancing of conflicting indicators.

557 F.2d at 654.

reference to a master are generally interlocutory and not [directly] appealable." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290-91 n.4, 85 L.Ed 189, 195 n.4, 61 S.Ct. 229 (1940); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2615 (1971 and 1994 Supplement). Moreover, as is discussed at length below, Petitioners' right to issuance of the writ is clear and indisputable because the district court disregarded the requirements of Rule 53 of the Federal Rules of Civil Procedure in determining whether to appoint a special master, and abdicated its judicial responsibilities under Article III of the United States Constitution by allowing the special master to hear and decide all pretrial matters in the case.

Petitioners actually satisfied four of the five *Bauman* guidelines. The first guideline (which is also the first prong of the *Mallard* standard) was satisfied because the reference to a special master is not directly appealable. The second guideline was met because, if the special master is allowed to proceed, Petitioners will be deprived of their right to have an Article III judge decide fundamental issues in the action below.

The third guideline was satisfied because, as is more fully discussed below, the district court's order is clearly erroneous. The fourth guideline was neither satisfied nor applicable because, while the district court's order manifests a clear disregard for the Federal Rules, there was no indication that its error is frequently repeated or is a manifestation of a persistent disregard for the Federal Rules. However, the fifth guideline was satisfied because the Ninth Circuit had not decided whether a district court may appoint a special master to decide motions *in limine*, dispositive motions and other important motions, in a case to be tried before a jury.

The Ninth Circuit did not explain its refusal to accept mandate apart from a broad reference to *Bauman*. However, the invocation of the additional *Bauman* guidelines directly conflicts with decisions by this Court and three other circuit courts: *La Buy v. Howes Leather Co., supra*, 352 U.S. 249; *Prudential Ins. Co. Of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1085-86 (3rd Cir. 1993); *In re U.S.*, 816 F.2d 1081, 1083 (6th Cir. 1987); *In re Bituminous Coal Operator's Ass'n, Inc.*, 949 F.2d 1165 (D.C. Cir. 1991).

Certiorari jurisdiction will be appropriately exercised here to determine whether the Ninth Circuit's five-prong *Bauman* analysis is reconcilable with this Court's two-element *Mallard* standard for issuance of writs of mandamus.

2. Certiorari should issue to explain whether jury or nonjury standards apply under Rule 53 to the appointment of a special master for pretrial matters in a jury trial.

Rule 53(b) of the Federal Rules of Civil Procedure provides: "A reference to a master shall be the exception and not the rule." *See also La Buy v. Howes Leather Co., supra*, 352 U.S. at 258, 1 L.Ed.2d at 298; *Burlington Northern v. Department of Revenue*, 934 F.2d 1064, 1071 (9th Cir. 1991). Rule 53(b) also provides that:

> In actions to be tried to a jury, a reference shall only be made when the issues are complicated; in actions to be tried without a jury, save in matters of account and difficult computations of damages, a reference shall be made

> only upon a showing that some exceptional condition requires it.

Rule 53 does not address whether the nonjury or the jury standard should be applied in cases to be tried to a jury where the special master is appointed to preside over pretrial proceedings; and this Court has yet to clarify this issue.

In this case, the district court invoked neither the "complicated" jury standard, nor the "exceptional condition" nonjury standard. In exercising its oversight jurisdiction here, this Court will settle an undecided issue and provide guidance to the District and Circuit Courts in an unsettled area of the practice of law.

a. If The NonJury Standard Is Applicable, The District Court Disregarded This Standard.

In *La Buy v. Howes Leather Co., supra*, 352 U.S. at 251, 258-59, 1 L.Ed.2d at 294, 298-299, the district court referred trial of two antitrust cases involving ninety-three plaintiffs and twelve defendants to a special master on the grounds that the court's docket was congested, the issues in the case were complex, and a great length of time would be required to try the cases. In rejecting these as proper grounds for a reference, this Court stated:

> . . . congestion in itself is not such an *exceptional circumstance* as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner realizes this, for in addition to calendar

> congestion, he alleges that the case referred to had unusual complexity of issues of both fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer *exceptional grounds*. (Emphasis added.)

Id. at 259.

In *Burlington Northern v. Department of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991), the Ninth Circuit held that a district court's reference of the entire trial of a matter involving an action for preliminary and permanent injunction against the payment of certain federal taxes was improper. The Court reversed because the reasons cited in the district court's order to justify the reference — another district judge's request and judicial efficiency — did not constitute *exceptional circumstances*. *Id.* at 1072.

Furthermore, in the factually similar case of *Prudential Ins. Co. Of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1081 (3rd Cir. 1993), plaintiff brought several products liability actions against several defendants. After four years of pretrial activity, the parties filed ten motions to dismiss various causes of action, to strike defenses, and for summary judgment. *Id.* at 1081 n.2.

The district court referred these motions for hearing before a special master. *Id.* at 1082. The Third Circuit issued a writ of mandamus ordering the district court to vacate its order, however, on the ground that *no exceptional circumstances* were present in the case to warrant the reference. *Id.* at 1085.

In view of the foregoing authority, the district court clearly erred in appointing a special master in this routine personal injury case involving a fall on a ship brought by a single plaintiff against two defendants. The court has not identified any exceptional circumstances warranting the appointment of a special master. Moreover, even if the court had alleged the existence of exceptional circumstances, no such circumstances are present in the action below, as the action below is a personal injury case in which there is nothing "exceptional" about either the number or nature of pretrial and trial motions filed. Therefore, as the district court clearly erred in appointing a special master when no "exceptional circumstances" were alleged or present, and the other requirements for mandamus relief were satisfied, the Ninth Circuit clearly erred in declining to issue the writ. Moreover, the Ninth Circuit's decision in the instant case to decline mandamus clearly conflicts with the decisions of this Court and the Third Circuit, and appears to conflict with its previous decision in *Burlington Northern, supra.*

b. If the Jury Standard is Applicable, the District Court Disregarded It.

The first sentence of Rule 53(b) of the Federal Rules of Civil Procedure not only provides that appointment of a special master "shall be the exception, not the rule," it

also requires that: "In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . . ." In *Dairy Queen v. Wood*, 369 U.S. 469, 475, 477, 82 L.Ed 44, 49-51, 82 S.Ct. 894 (1962), this Court appears to have imposed a very strict standard under which special masters may properly be appointed in cases to be tried before a jury.

In *Dairy Queen*, plaintiff brought an action for trademark infringement and breach of contract, but styled its complaint as an action for an equitable accounting. This Court held that plaintiff had brought a legal action on a debt allegedly due under a contract entitling him to trial by jury, not an equitable action for accounting. The Court explained:

> Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them. (footnote omitted). In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those *exceptional* cases where the legal issues are too *complicated* for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. (Emphasis added.)

Id. at 478. In the footnote, the Court stated:

> Even this limited inroad upon the right to jury trial " 'should seldom be made, and if at all only when *unusual circumstances* exist.' " (Emphasis added.)

Id. n.18, *citing La Buy v. Howes Leather Co., supra*, 352 U.S. at 258, 1 L.Ed.2d at 298. Accordingly, the Court clearly indicated that the appointment of a special master in jury cases is only appropriate if exceptional circumstances exist *and* the issues to be referred are so complex that a jury cannot determine the issues to be referred without the aid of a special master.[4]

Moreover, in *Prudential Ins. Co. Of America v. U.S. Gypsum Co.*, 991 F.2d at 1086 n.10, the Third Circuit recently indicated that it would be inclined to impose a more stringent standard in jury cases than in nonjury cases.

The Ninth Circuit's sole post-*Dairy Queen* application of the jury standard to an order of reference appears in *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 868 (9th Cir. 1976), where the Court upheld the appointment of a special master in a case to be tried to a jury on the ground that the issues referred were too complicated for a jury to decide without the aid of a master. The court only applied the "complex issues" standard, without

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[4] In *Dairy Queen*, this Court stated that the issues were not sufficiently complex to justify appointing a special master, finding:

> But be that as it may, this is certainly not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two.

369 U.S. at 478-479, 8 L.Ed.2d at 51-52.

discussing whether the "exceptional circumstances" standard also had to be met. It is therefore in conflict with *Prudential* from the Third Circuit, and with *Dairy Queen* in failing to recognize the double requirement.[5]

In the present case, the district court's order does not identify any issues that a jury would be unable to determine without the aid of a special master. Nor did the court make any such statement at the hearing on Plaintiff's *ex parte* application on April 19. All the motions assigned to the special master involve the admissibility of evidence or questions of law. The special master will not be required to explain any of these issues to a jury to assist it in its determination of the case.

Accordingly, if the jury standard is applicable in the present case, the district court clearly erred in appointing the special master, as the master is not going to aid the jury in determining any complex issues, and there are no complex issues to be decided in any event. Given the foregoing, the Ninth Circuit clearly abused its discretion in declining to issue the writ. Moreover, its decision in *Crateo* indicates that it is confused as to the correct standard to apply, and this case presents the perfect vehicle to eliminate such confusion.

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[5] Another case factually similar to *Crateo* is *Burgess v. Williams*, 302 F.2d 91, 94 (4th Cir. 1962), where the Fourth Circuit upheld the appointment of a special master to make factual findings to the court (1) whether 107 individuals who received payments from a bankrupt company were creditors or joint venturers and (2) if they were joint venturers, whether the bankrupt company was insolvent at the time each payment was made. Note, however, that this decision is flawed in that the court made no mention of the decision in *Dairy Queen v. Wood*, which was decided six years prior to the Fourth Circuit's decision in *Burgess*.

c. Certiorari should issue to explain a special master's authority to decide outcome-determinative issues.

The district court in the present case gave the special master unlimited authority to act as a judge and decide the motions himself. By giving such powers to the special master, the district court abdicated its judicial responsibilities under Article III.[6] Rule 53 of the Federal Rules of Civil Procedure authorizes the appointment of special masters to *assist*, not to replace, federal judges. *In re Bituminous Coal Operators' Ass'n, Inc., supra*, 949 F.2d at 1168, *citing* U.S. Const. art. III[7] and amend. VIII; *La Buy v. Howes Leather Co., supra*, 352 U.S. at 256, 1 L.Ed.2d at 297. *In re Bituminous Coal Operators' Ass'n, supra*, 949 F.2d at 1169 ("it is the function of the district judge . . . to decide issues of fact and law genuinely disputed by the parties").

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6 The court's Minute Order provides that the special master shall "handle all pretrial proceedings in this case." At the hearing on Plaintiff's *ex parte* application, however, the court made clear that the special master would decide the motions *in limine* and trial motions during the following exchange:

> MR. COGSWELL: Is it the court's intention that Mr. Hoegh is to decide the motions *in limine*, for example?
> THE COURT: All pretrial matters. What do you call a motion *in limine*?

Moreover, the district court's response to Petitioners' assertion that appointing a special master violated Article III was simply: "Poppycock."

7 Article III, section 1, of the Constitution provides: "The judicial power of the United States shall, be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Every circuit that has ruled on the reference of the entire trial of an action to a special master has ruled that such a reference is improper. *Burlington Northern v. Department of Revenue, supra*, 934 F.2d at 1074 (9th Cir.); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992); *In re U.S., supra*, 816 F.2d at 1091 (6th Cir.); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 712 (7th Cir. 1984); *In re Bituminous Coal Operator's Ass'n, Inc., supra*, 949 F.2d at 1168 (D.C. Cir.).

Additionally, almost every circuit that has considered the propriety of a special master presiding over dispositive pretrial motions has found such references improper. *Stauble, supra*, 977 F.2d at 695 (1st Cir.); *Prudential Ins. Co. Of America, supra*, 991 F.2d at 1088 (3rd Cir.); *In re U.S., supra*, 816 F.2d at 1091 (6th Cir.); *Jack Walters & Sons Corp. v. Morton Building, Inc., supra*, 737 F.2d at 712 (7th Cir.); *Liptak v. United States*, 748 F.2d 1254, 1257 (8th Cir. 1984).

Note that in *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985), the Eighth Circuit suggested that it may be proper for a special master to hear and make *recommendations* regarding (but not decide) dispositive pretrial motions. The Eighth Circuit's reasoning in *Armco* has been expressly rejected by the Sixth Circuit in *In re U.S.*, 816 F.2d at 1091, and by the First Circuit in *Stauble*, 977 F.2d at 695 ns.6 and 7.

Moreover, although the District of Columbia Circuit in *In re Bituminous Coal Operator's Ass'n, Inc.*, 949 F.2d at 1169, stated that it agreed with most of the language contained in the district court order at issue in *Armco*, it deleted the specific language referring to the special master's power to "hear motions for summary judgment or dismissal and make recommendations with respect thereto." Consequently, it appears that the

Federal Circuit also disapproves of allowing special masters to hear dispositive motions.

In *Burlington Northern v. Department of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991), the Ninth Circuit did not specifically rule on whether special masters could hear and make recommendations regarding the disposition of pretrial motions. However, the Ninth Circuit appeared inclined to impose stringent restrictions on the powers of a special master in finding that the district court had "granted excessive power" to a special master when it allowed him to hear and *recommend* disposition of a motion for a preliminary injunction, which is clearly a nondispositive motion. *Id.* Yet, in the present case, the denial of mandate suggests to all of the judges of the Central District of California (the largest federal district) that special masters are entitled to decide all pretrial motions, dispositive or otherwise. There is clearly confusion within the Ninth Circuit and between the Circuits as to the scope of a special master's authority. Certiorari should issue to clarify this problem.

CONCLUSION

Petitioners request that the Court grant their petition for writ of certiorari to resolve these three important unsettled issues:

(1) Whether *Bauman* is superseded by *Mallard*;

(2) What standards apply to the appointment of a pretrial special master prior to trial by jury;

(3) What disputed issues, if any, can be delegated to a special master.

In granting certiorari and deciding these issues, this Court would provide guidance to district and circuit courts in important areas of daily practice, and particularly would give guidance to a district court in this case which has shown itself confused by the conflicting decisions of various circuits.

Alternatively, this Court is requested to issue its writ to the Ninth Circuit commanding it to issue its own writ of mandate so that the issue may be fully resolved at a lower level.

DATED: September 16, 1994.

Respectfully submitted,

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Counsel of Record

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MARK D. HOLMES

WILLIAMS WOOLLEY COGSWELL
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 21 1994
Cathy A. Catterson, Clerk
U.S.Court of Appeals

TRANSPORTATION MARITIMA MEXICANA, S.A., et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
DAVID TAMMEN, et al.,
Real-Parties-in-Interest.

No. 94-70294
DC# CV-92-05729-AAH
Central California (Los Angeles)

ORDER

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

The petition for writ of mandamus and stay of proceedings is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1997).

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

Case No. CV 92-5729-AAH(CTx) Date 4-19-94
Title David Tammen-vs-M/V Mitla, et al

DOCKET ENTRY

PRESENT:
HON. A. ANDREW HAUK, JUDGE

Paul Smith	Lynne Smith
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert Nizich
Thomas Hampton

ATTORNEYS PRESENT FOR DEFENDANTS:
Forrest Cogswell
Mark Holmes

PROCEEDINGS:

Mr. Richard B. Hoegh, Esq. is present at the request of the Court.

Status conference held.

Court appoints and designates Mr. Richard B. Hoegh, Esq. as Special Master to handle all pre-trial proceedings in this case.

Court orders that all counsel are to confer with the Special Master re further pre-trial proceedings and orders.

Court orders that each side deposit $10,000.00 into the Registry of the Court not later than May 4, 1994. Monies so deposited shall cover the fees and costs of the Special Master with a monthly billing submitted by the Speical [sic] Master to the Court and all counsel.

Court orders that defendants' counsel may, if they wish, post a $1,000,000.00 bond on appeal fully justified with cash whereupon this Court may issue a stay order.

Court orders that a copy of this minute order shall be served by mail on all counsel of record and on Special Master Richard B. Hoegh.

MINUTES FORM II Initials of Deputy Clerk:___
CIVIL - GEN D-M

APPENDIX C

The All Writs Act, 28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congres may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.)

UNITED STATES CONSTITUTION
Article III

Section 1. Judicial Power, Tenure and Compensation

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 53. Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U.S.C. section 636(b)(2). The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning

and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion,

adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless other-

wise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The ef- fect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) [Application to Magistrate.][1] A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.

(As amended Feb. 18, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

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1 **Subdivision heading editorially supplied.**